



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 30, 1998

Ms. Sandra C. Joseph  
Open Records Counsel/Disclosure Officer  
Comptroller of Public Accounts  
P.O. Box 13528  
Austin, Texas 78711

OR98-0827

Dear Ms. Joseph:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 113590.

The Comptroller of Public Accounts (the "comptroller") received a request for all bids submitted in response to the statement of need for Year 2000 conversion services and related services that were issued on October 3, 1997. You assert that the information may be excepted from disclosure pursuant to section 552.110 of the Government Code, but state that you express no opinion as to whether the information is confidential.

Pursuant to section 552.305 of the Government Code, we notified seven companies of the request for information and of their opportunity to claim that the information at issue is excepted from disclosure. Five of the companies, Ipso Facto Consulting, Inc., BDM International, Inc., Hitachi Data Systems Corp., Computer Associates International and Amdahl/DMR TRECOM, did not respond to our notification. Therefore, we have no basis upon which to conclude that the information relating to these companies that is the subject of the request is confidential, and it must be released to the requestor. Keane, Inc. ("Keane") and IBM Corp. ("IBM") responded and argued that their responsive information is protected as trade secrets and commercial or financial information under section 552.110. We will therefore address their arguments under section 552.110.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>1</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.

Upon review of the arguments submitted by Keane, we conclude that Keane may withhold as a trade secret the specific information identified by it in the document entitled "Proposal for Year 2000 Conversion Services and Related Services," as well as in its "Best and Final Offer" dated December 3, 1997 and in its November 7, 1997 clarification letter, with the following exceptions. Keane may not withhold the information we have marked in the November 7, 1997 letter, nor may it withhold its staffing lists and resumes of key personnel in its "Proposal for Year 2000 Conversion Services and Related Services." In Open Records Decision No. 175 (1977), this office ruled that "resumes listing the education and experience of . . . employees . . . cannot . . . reasonably be said to fall within the 'trade secret' or any other exception to the Open Records Act." *See also* Open Records Decision Nos. 306 (1982) (resumes listing education and experience of employees of

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<sup>1</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

private company are not excepted by predecessor to section 552.110), 319 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted by predecessor to section 552.110).

Upon review of the arguments submitted by IBM, we conclude that IBM may withhold as trade secret information the Transformation 2000 service methodology set forth in Section 3.3 of Appendix E, pages E13-E19, as well as the detailed description of the deliverables resulting from the Transformation 2000 methodology that are set forth in Appendix E, pages E28-E30.

Keene and IBM also argue that certain sections in their proposals regarding pricing and pricing assumptions constitute "financial information" which is confidential under the commercial or financial prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770.

Keane states that "Keane and its competitors continue to vie for Year 2000 business. Keane's current business as well as new business in this market is contingent on its ability to effectively compete for business. If competitors are able to understand the details of Keane's pricing strategy as provided in the context of government contracts, Keane's 'competitive position' in the Year 2000 market is likely to be severely undermined." With regard to its detailed pricing information, IBM argues that "the pricing structure . . . provides a blueprint for IBM's unique pricing solution with a level of specificity sufficient to enable a competing vendor like Strategic Partnerships, Inc. to develop pricing proposals that specifically underbids IBM's proposals."

This office has stated on many occasions that there is a legitimate public interest in the expenditure of public funds. *See* Open Records Decision Nos. 541 (1990) at 1-2, 520 (1989) at 5, 518 (1989) at 7, 233 (1980) at 2; Gov't Code 552.022(3). Moreover, this office has stated that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision 600 (1992). Federal cases applying the analogous FOIA exemption 4 have required a balancing of the public interest in disclosure with the competitive injury to the company in question. *See* Open Records Decision No. 494 (1988) at 6; *see generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 136-138, 140-141, 151-152 (disclosure of prices is cost of doing business with government).

In this case, neither IBM nor Keane were awarded the Year 2000 conversion services contract. Therefore, we find that public interest in this pricing information is diminished, and conclude that both Keane and IBM have established that specific pricing information, which they have identified, must be withheld from disclosure as commercial or financial information under section 552.110. The remaining information responsive to the request must be released to the

requestor. *See generally Chemical Waste Management, Inc. v. O'Leary*, 1995 WL 115894, February 25, 1995 (D.D.C.).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/ch

Ref.: ID# 113590

Enclosures: Marked documents

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